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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON

8 BRYAN A.,

9 Plaintiff,

10 v.

11 COMMISSIONER OF SOCIAL  
12 SECURITY,

13 Defendant.

NO. C17-1921-JPD

ORDER REVERSING AND  
REMANDING FOR FURTHER  
PROCEEDINGS

14 Plaintiff appeals the final decision of the Commissioner of the Social Security  
15 Administration (“Commissioner”) which denied his applications for Disability Insurance  
16 Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the  
17 Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an  
18 administrative law judge (“ALJ”). For the reasons set forth below, the Court ORDERS that the  
19 Commissioner’s decision be REVERSED and REMANDED.

20 I. FACTS AND PROCEDURAL HISTORY

21 At the time of the administrative hearing, plaintiff was a forty-five year old man with  
22 the equivalent of a high school education. Administrative Record (“AR”) at 40.<sup>1</sup> His past  
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24 <sup>1</sup> Plaintiff testified that he completed eighth grade, but failed the ninth grade repeatedly.  
AR at 40. He later obtained his GED. AR at 40.

1 work experience includes employment as a software tester, dishwasher at a restaurant, kitchen  
2 helper, and carpentry/masonry engineer. AR at 43-47, 59. Plaintiff was last gainfully  
3 employed as a dishwasher at the Epulo restaurant in Edmonds. AR at 42, 48.

4 On July 21, 2014, plaintiff filed a claim for SSI payments and DIB, alleging an onset  
5 date of February 1, 2011. AR at 17. During the administrative hearing, however, plaintiff  
6 amended his alleged onset date to May 7, 2014. AR at 39. Plaintiff asserts that he is disabled  
7 due to anxiety, depression, homelessness, dental problems, and osteopenia. AR at 66.

8 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 17,  
9 118-25, 129-40. Plaintiff requested a hearing, which took place on July 26, 2016. AR at 36-  
10 63. On September 30, 2016, the ALJ issued a decision finding plaintiff not disabled and  
11 denied benefits based on his finding that plaintiff could perform his past relevant work as a  
12 kitchen helper, or alternatively, a specific job existing in significant numbers in the national  
13 economy. AR at 14-31. Plaintiff's request for review was denied by the Appeals Council, AR  
14 at 1-6, making the ALJ's ruling the "final decision" of the Commissioner as that term is  
15 defined by 42 U.S.C. § 405(g). On January 4, 2018, plaintiff timely filed the present action  
16 challenging the Commissioner's decision. Dkt. 4.

## 17 II. JURISDICTION

18 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
19 405(g) and 1383(c)(3).

## 20 III. STANDARD OF REVIEW

21 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
22 social security benefits when the ALJ's findings are based on legal error or not supported by  
23 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
24 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is

1 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
2 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
3 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
4 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
5 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
6 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
7 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
8 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
9 must be upheld. *Id.*

10 The Court may direct an award of benefits where "the record has been fully developed  
11 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
12 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
13 (9th Cir. 1996)). The Court may find that this occurs when:

14 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
15 claimant's evidence; (2) there are no outstanding issues that must be resolved  
16 before a determination of disability can be made; and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

17 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
18 erroneously rejected evidence may be credited when all three elements are met).

#### 19 IV. EVALUATING DISABILITY

20 The claimant bears the burden of proving that he is disabled within the meaning of the  
21 Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)  
22 (internal citations omitted). The Act defines disability as the "inability to engage in any  
23 substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
24 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§

1 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are  
2 of such severity that he is unable to do his previous work, and cannot, considering his age,  
3 education, and work experience, engage in any other substantial gainful activity existing in the  
4 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
5 99 (9th Cir. 1999).

6 The Commissioner has established a five step sequential evaluation process for  
7 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
8 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
9 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
10 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
11 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
12 §§ 404.1520(b), 416.920(b).<sup>2</sup> If he is, disability benefits are denied. If he is not, the  
13 Commissioner proceeds to step two. At step two, the claimant must establish that he has one  
14 or more medically severe impairments, or combination of impairments, that limit his physical  
15 or mental ability to do basic work activities. If the claimant does not have such impairments,  
16 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
17 impairment, the Commissioner moves to step three to determine whether the impairment meets  
18 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
19 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
20 twelve-month duration requirement is disabled. *Id.*

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22  
23 <sup>2</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 When the claimant's impairment neither meets nor equals one of the impairments listed  
2 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's  
3 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
4 Commissioner evaluates the physical and mental demands of the claimant's past relevant work  
5 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
6 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,  
7 then the burden shifts to the Commissioner at step five to show that the claimant can perform  
8 other work that exists in significant numbers in the national economy, taking into consideration  
9 the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),  
10 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable  
11 to perform other work, then the claimant is found disabled and benefits may be awarded.

## 12 V. DECISION BELOW

13 On September 30, 2016, the ALJ issued a decision finding the following:

- 14 1. The claimant meets the insured status requirements of the Social  
15 Security Act through March 31, 2016.
- 16 2. The claimant has not engaged in substantial gainful activity since  
17 February 1, 2011, the alleged onset date.
- 18 3. The claimant has the following severe impairments: degenerative  
19 changes of the thoracic and lumbar spine with osteopenia, major  
20 depressive disorder, and post-traumatic stress disorder.
- 21 4. The claimant does not have an impairment or combination of  
22 impairments that meets or medically equals the severity of one of the  
23 listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 24 5. After careful consideration of the entire record, the undersigned finds  
that the claimant has the residual functional capacity to perform a  
limited range of medium work as defined in 20 CFR 404.1567(c) and  
416.967(c). Specifically, the claimant can lift and carry 50 pounds  
occasionally and 25 pound frequently and can sit, stand, and/or walk  
for about six hours a day for each function with normal breaks. The  
claimant is limited to occasional climbing of ladders, ropes, and  
scaffolds and is able to frequently climb stairs or ramps, balance,

1 stoop, kneel, crouch, or crawl. The claimant is limited to infrequent  
2 superficial interaction with the general public, occasional superficial  
3 interaction with co- workers, and occasional interaction with  
supervisors. Further, the claimant is limited to occupations with a  
specific vocational preparation (SVP) rating of 1 or 2.

4 6. The claimant is capable of performing past relevant work as a kitchen  
5 helper. This work does not require the performance of work-related

6 7. The claimant has not been under a disability, as defined in the Social  
Security Act, from February 1, 2011, through the date of this decision.

7 AR at 19-31.

## 8 VI. ISSUES ON APPEAL

9 The principal issues on appeal are:

- 10 1. Did the ALJ err in evaluating the medical opinion evidence?
- 11 2. Did the ALJ err in evaluating the opinion of plaintiff's mental health counselor?
- 12 3. Did the ALJ err in evaluating plaintiff's testimony?
- 13 4. Does substantial evidence support the ALJ's decision, despite the new evidence  
submitted by plaintiff to the Appeals Council?
- 14 5. Did the ALJ properly determine plaintiff's RFC?

15 Dkt. 10 at 1; Dkt. 13 at 1-2.

## 16 VII. DISCUSSION

### 17 A. The ALJ Erred in Evaluating the Medical Opinion Evidence

#### 18 1. *Standards for Reviewing Medical Evidence*

19 As a matter of law, more weight is given to a treating physician's opinion than to that  
20 of a non-treating physician because a treating physician "is employed to cure and has a greater  
21 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d  
22 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating  
23 physician's opinion, however, is not necessarily conclusive as to either a physical condition or  
24 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.

1 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining  
2 physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not  
3 contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*,  
4 157 F.3d 715, 725 (9th Cir. 1988). “This can be done by setting out a detailed and thorough  
5 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
6 making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than  
7 merely state his/her conclusions. “He must set forth his own interpretations and explain why  
8 they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22  
9 (9th Cir. 1988)). Such conclusions must at all times be supported by substantial evidence.  
10 *Reddick*, 157 F.3d at 725.

11 The opinions of examining physicians are to be given more weight than non-examining  
12 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Like treating physicians, the  
13 uncontradicted opinions of examining physicians may not be rejected without clear and  
14 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
15 physician only by providing specific and legitimate reasons that are supported by the record.  
16 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

17 Opinions from non-examining medical sources are to be given less weight than treating  
18 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
19 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
20 evaluate the opinion of a non-examining source and explain the weight given to it. Social  
21 Security Ruling (“SSR”) 96-6p, 1996 WL 374180, at \*2. Although an ALJ generally gives  
22 more weight to an examining doctor’s opinion than to a non-examining doctor’s opinion, a  
23 non-examining doctor’s opinion may nonetheless constitute substantial evidence if it is  
24

1 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,  
2 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

3           2.       *The ALJ Erred by Rejecting the Opinions of the Treating and Examining*  
4                    *Physicians in Favor of Non-Examining Physicians*

5           The ALJ discussed and either rejected or gave “little weight” to the medical opinions of  
6 examining psychologist Georgie Knapp, Psy.D., plaintiff’s treating psychiatrist James  
7 Basinski, M.D., and treating therapist Ashley Proto, M.S.W., M.H.P., in favor of the opinions  
8 of state agency physicians who neither examined nor treated plaintiff. AR at 26-29. In  
9 addition, the ALJ rejected significant social limitations assessed by Allan Breen, Ph.D., while  
10 professing to accord his opinion great weight. AR at 26. Plaintiff argues the ALJ erred by  
11 failing to provide specific and legitimate reasons for rejecting the treating and examining  
12 doctors’ opinions in favor of the non-treating/non-examining doctors. The Court agrees, and  
13 finds that the ALJ’s evaluation of the medical evidence in this case runs afoul of the hierarchy  
14 discussed in *Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007). As this error must be corrected on  
15 remand, a brief discussion of the ALJ’s errors with respect to each treating or examining  
16 provider is addressed below.

17           3.       *Dr. Geordie Knapp, Psy.D.*

18           Dr. Knapp conducted a psychological evaluation of plaintiff in May 2014. AR 332-36.  
19 Plaintiff told Dr. Knapp that he was homeless, staying at the mission, and was seeking  
20 assistance due to depression and anxiety. AR at 332. Plaintiff reported a “vicious and  
21 belabored” childhood stating his father had “whipped the confrontational part out of [him].”  
22 AR 332. He related how his mother had been bothered by depression eventually committing  
23 suicide when he was 19. AR at 332. Plaintiff reported supporting himself through working  
24 and day trading on the internet with a small amount of money he had been able to keep



1 reinvesting, earning enough money to pay for a storage unit. AR at 332. Plaintiff reported he  
2 was living in a shelter, spending his day looking for work and chasing food. AR at 332. Dr.  
3 Knapp observed the following symptoms during his clinical interview: depressed mood,  
4 anhedonia, reexperiencing, avoidance, and increased arousal. AR at 333.

5       On mental status examination, he found plaintiff to be hypoactive and tense with slow  
6 quiet speech. He was oriented to person, time, and place, but his mood was described as  
7 anxious, depressed, and his affect was tearful. AR at 336. Dr. Knapp found plaintiff pleasant  
8 and cooperative. AR at 336. However, plaintiff only remembered 2 of 3 items after five  
9 minutes. AR at 335-36. Dr. Knapp diagnosed major depressive disorder (recurrent, severe  
10 without psychotic features) and chronic post-traumatic stress disorder (PTSD). AR at 333.  
11 Dr. Knapp also noted plaintiff's mother's suicide further impaired his ability to interact with  
12 others and that while plaintiff was "fairly able to get by, his disorders caused serious  
13 impairment in his ability to obtain and maintain employment." AR at 334. In assessing  
14 plaintiff's ability to perform basic work activities, Dr. Knapp opined he would have marked  
15 limitations in his ability to perform activities within a schedule; to maintain regular attendance  
16 and be punctual within customary tolerances without special supervision; and to communicate  
17 and perform effectively in a work setting. AR at 334. Dr. Knapp assessed a severe limitation  
18 in his ability to complete a normal work day and work week without interruptions from  
19 psychologically based symptoms. AR at 334.

20       The ALJ accorded little weight to the marked and severe limitations assessed by Dr.  
21 Knapp, due to the evaluation "showing largely intact mental functioning" and because Dr.  
22 Knapp opined that plaintiff could benefit with treatment. Specifically, the ALJ stated,

23       The undersigned accords great weight to Dr. Knapp's opinion regarding those  
24 areas in which the claimant will have up to moderate difficulties given that this  
aspect of his opinion is consistent with the results of his contemporaneous

1 evaluation showing that although the claimant presented with depressed mood and  
2 flat affect and likewise had speech characterized by limited word production and  
3 that was slow and low in volume, he was otherwise alert and fully conscious with  
4 logical and progressive presentation, pleasant and cooperative, and was noted to  
5 take the evaluation seriously and give considered answers while doing his best on  
6 the tasks that were presented to him. Similarly, although the claimant was noted  
7 to have memory outside of normal limits in that he was only able to recall two out  
8 of three items after five minutes, he otherwise had thought process and content,  
9 orientation, perception, fund of knowledge, concentration, and abstract thought all  
10 within normal limits. Based upon this evaluation showing largely intact mental  
11 functioning, the undersigned accords little weight to Dr. Knapp's opinion  
12 regarding those areas in which the claimant will have marked or severe  
13 difficulties, as well as his assessed GAF score. According little weight to these  
14 aspects of Dr. Knapp's opinion is also consistent with the fact that he opined that  
15 the claimant would benefit from counseling and case management, thus indicating  
16 that the claimant's mental health symptoms are not intractable.

17 AR at 27.

18 The ALJ's reasons were not specific, legitimate, or supported by substantial evidence.  
19 The ALJ's own lay assertion that plaintiff had "intact mental functioning," without more, is  
20 insufficient to reject Dr. Knapp's findings concerning the marked and severe limitations that  
21 would interfere with plaintiff's abilities to perform activities within a schedule, maintain  
22 regular attendance, communicate and perform effectively in a work setting, and complete a  
23 normal work week. As discussed below, Dr. Knapp's findings also appear to be consistent  
24 with the findings of Dr. Basinski and plaintiff's treating therapist, Ms. Proto. AR at 334, 423-  
25 29. An ALJ may not substitute his or her judgment for that of a medical professional, nor may  
26 the ALJ make independent medical findings.

27 The ALJ's rejection of Dr. Knapp's findings based upon his statement that plaintiff  
28 "would benefit from counseling and case management, thus indicating that the claimant's  
29 mental health symptoms are not intractable" is also not specific and legitimate. Although the  
30 ALJ could reasonably reject Dr. Knapp's opinion based upon evidence of actual medical  
31 improvement with treatment, the fact that Dr. Knapp thought that perhaps plaintiff *could* – but

1 has not – benefitted from counseling and treatment does not indicate his symptoms would not  
2 interfere with his ability to work. Dr. Knapp also did not indicate that if plaintiff obtained  
3 treatment, he would then be able to perform full-time work despite his impairments. The  
4 ALJ’s rejection of Dr. Knapp’s opinion that “while fairly [plaintiff is] able to get by, his  
5 disorders cause serious impairment in his ability to obtain and maintain employment” was not  
6 supported by substantial evidence. AR at 27, 334.

7                   4.       *James Basinski, M.D.*

8           Plaintiff presented to Dr. Basinski in July 2014 for a psychiatric intake examination.  
9 AR at 349. Plaintiff reported disappointment that he would not be meeting with Dr. Basinski  
10 more often, as well as feeling moderately depressed and reluctant to take medications. AR at  
11 349. Dr. Basinski noted he was tearful a couple of times during the interview. AR at 349.  
12 Mental status exam revealed plaintiff to be fairly kempt, he was somewhat restless at times, but  
13 made good eye contact, his speech was normal rate and volume although talkative, his affect  
14 was moderately anxious, with his mood depressed and anxious. AR at 350. Plaintiff’s thought  
15 form was circumstantial, and he was mildly distractible, with intact memory and fair insight  
16 and judgment. AR at 350. Dr. Basinski diagnosed major depressive disorder, with anxiety,  
17 rule out cannabis use disorder, and likely a personality disorder. AR at 349. He assessed  
18 plaintiff as having a family history of depressive disorder with suicide recurrent mood and  
19 anxiety problems, cannabis use, and psychosocial marginalization. AR at 350. Dr. Basinski  
20 further noted that plaintiff had some personality vulnerabilities around mood lability,  
21 interpersonal vulnerability, and difficulty adjusting, perfectionism, and a need to control to  
22 actual work situations and opportunities. AR at 350.

23           The ALJ accorded this assessment little weight because it was vague in providing  
24 specific workplace limitations and was based in large part on plaintiff’s subjective complaints

1 AR at 28. However, the purpose of this intake evaluation was to establish psychiatric care and  
2 a plan of treatment, rather than assess plaintiff's workplace limitations. AR at 349-50. In  
3 addition, the ALJ's second reason for according this opinion little weight, because the findings  
4 "appear[] to be based in large part on the claimant's own subjective complaints" rather than  
5 upon objective findings of the mental status examination, is not specific and legitimate. *See*  
6 *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (noting that "psychiatric evaluations  
7 may appear subjective, especially compared to evaluation in other medical fields. Diagnoses  
8 will always depend in part on the patient's self-report, as well as on the clinician's observations  
9 of the patient. But such is the nature of psychiatry. Thus, the rule allowing an ALJ to reject  
10 opinions based on self-reports does not apply in the same manner to opinions regarding mental  
11 illness." ). In light of the fact that Dr. Basinski's mental status examination revealed restless  
12 behavior, moderately anxious affect, depressed and anxious mood, and circumstantial speech,  
13 the ALJ's conclusion that Dr. Basinski's opinion was inconsistent with his clinical observations  
14 on mental status examination is not supported by substantial evidence.

15 In March 2016, Dr. Basinski prepared a Psychological/ Psychiatric Evaluation for the  
16 Department of Social and Health Services (DSHS) which did include an assessment of  
17 plaintiff's workplace limitations. AR at 432-26. Dr. Basinski had provided counseling  
18 services and coordinated plaintiff's care on at least nine different occasions at that time. AR at  
19 349-50, 352, 423-26, 444, 514, 550, 567, 595, 617, 708, 718-19. Dr. Basinski noted plaintiff's  
20 symptoms of low mood, hopelessness, low motivation, social anxiety, irritability, rumination,  
21 and food restriction, all of which were moderate to severe and chronic for the past two years  
22 and continuing. AR at 424. Dr. Basinski opined that plaintiff would have marked limitations  
23 in his ability to understand, remember, and persist in tasks by following short instructions;  
24 make simple work-related decisions; and to complete a normal work day and work week

1 without interruptions from psychologically based symptoms. AR at 424. Dr. Basinski also  
2 found plaintiff would have severe limitations in eight different areas, including the ability to  
3 set realistic goals and act independently; to maintain appropriate behaving in a work setting; to  
4 perform activities within a schedule, to maintain regular attendance; and to be punctual within  
5 customary tolerances without special supervision. AR at 424. Dr. Basinski opined that with  
6 available treatment, plaintiff would be impaired for 24 months. AR at 425.

7         The ALJ accorded Dr. Basinski's March 2016 opinion little weight as he thought the  
8 significant limitations were inconsistent with his objective findings. AR at 29. As with Dr.  
9 Knapp, the ALJ cherry-picked the few positive findings from the form to support his rejection  
10 of Dr. Basinski's opinion. For example, the ALJ acknowledged that plaintiff presented on  
11 mental status examination as "restricted and superficially deferential with an undercurrent of  
12 resistance," as well as "profoundly" negative thinking. Nevertheless, the ALJ apparently  
13 dismissed these observations, because other aspects of the mental status examination, such as  
14 plaintiff's eye contact, orientation, and fund of knowledge, were within normal limits. AR at  
15 29. The ALJ's reasoning is not specific, legitimate, or supported by substantial evidence. *See*  
16 *Attmore v. Colvin*, 827 F.3d 875, 877 (9th Cir. 2016) (noting that the ALJ is not permitted to  
17 cherry pick from mixed results to support a denial of benefits, as "the examples an ALJ  
18 chooses 'must *in fact* constitute examples of a broader development.'") (quoting *Garrison v.*  
19 *Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014)). The ALJ also did not address any of plaintiff's  
20 treatment records in evaluating Dr. Basinski's opinion, although those treatment records  
21 provided significant background for Dr. Basinski's March 2016 opinion. *See Garrison*, 759  
22 F.3d at 1013-14 (an ALJ errs when he "entirely ignored most of his treatment records" of a  
23 provider, when the opinions expressed in the provider's check-box form were based on  
24 significant experience with the claimant and supported by numerous records). Accordingly,

1 the ALJ did not provide legally valid reasons for rejecting the July 2014 or March 2016  
2 opinions of Dr. Basinki.

3 5. *Alan Breen, Ph.D.*

4 Dr. Breen, an examining psychologist, performed a neuropsychological evaluation of  
5 plaintiff in October 2011. AR at 325-31. Specifically, Dr. Breen conducted a clinical  
6 interview and administered a battery of tests. Plaintiff reported a history of abuse by his father  
7 who would lock him in his room with his brother, and not provide any food. AR at 325.  
8 Plaintiff also reported how his mother struggled with depression and committed suicide when  
9 he was nineteen. AR at 325. Plaintiff related a history of working multiple jobs, losing his last  
10 job when he forgot to lock the door when he left. AR at 325-26. During the mental status  
11 examination, plaintiff was noted to need a shower and a shave. AR at 326. He had logical  
12 organized thinking with no evidence of attention, memory or language difficulties. AR at 326.  
13 However, he was “clearly depressed,” endorsing signs of major depression characterized by  
14 anhedonia, poor concentration, low energy, hypersomnia, and low self-esteem. AR at 326.  
15 Plaintiff reported rapid mood swings, having three to four-day periods when he would  
16 sleep just four hours with increased impulsivity, irritability, racing thoughts, and distractibility,  
17 which Dr. Breen found consistent with hypomanic episodes or perhaps bipolar II disorder. AR  
18 at 326. Dr. Breen observed plaintiff to be cooperative, but “distant from the process.” AR  
19 326. Plaintiff gave up quickly when he did not know the answer. AR at 326. He was  
20 sarcastic, and on logical memory testing he did very poorly saying even though he knew it was  
21 test, he did not care enough to try. AR at 326.

22 Dr. Breen’s diagnostic impression was rule out cyclothymia and rule out marijuana  
23 abuse. AR at 328. He recommended that plaintiff be stabilized with social services including  
24 welfare, a stable place to live, and access to treatment. AR at 328. Dr. Breen noted plaintiff

1 had an educational goal, but no vocational goal. AR at 328. Dr. Breen thought plaintiff could  
2 handle a number of routine jobs without much difficulty, but he would need to be able to work  
3 no more than twenty hours per week in order to accommodate his educational plans. AR at  
4 328. Dr. Breen prepared a functional loss indicator and indicated that in the area of  
5 interpersonal skills, plaintiff would have a pervasive pattern of social and interpersonal deficits  
6 such as extreme awkwardness, withdrawal, anxiety, anger, aggression, and suspiciousness and  
7 that he would isolate himself from others and/or withdraw from interpersonal situations. AR at  
8 329-30.

9 The ALJ accorded Dr. Breen's opinion great weight except for the portion that limited  
10 plaintiff to working no more than twenty hours a week. AR at 26. However, the ALJ made no  
11 finding as to Dr. Breen's opinion that plaintiff would have a pervasive pattern of social and  
12 interpersonal deficits or would isolate or withdraw from interpersonal situations. Thus, the  
13 ALJ once again cherry-picked evidence from a provider's report that would support his  
14 conclusion, without providing adequate reasons to reject the findings he did not agree with.  
15 *See Ghanim*, 763 F.3d at 1164. This was err, as Dr. Breen's indication of significant  
16 difficulties in social and interpersonal situations appears entirely consistent with the  
17 assessments of Drs. Basinski and Knapp in these areas.

18 6. *Ashley Proto, M.S.W.*

19 Plaintiff's mental health counselor, Ashley Proto, M.S.W., provided mental health  
20 counseling to plaintiff on at least twenty-eight occasions during the relevant period. AR 337,  
21 339, 341, 373, 390, 395, 397, 406, 440, 449, 479, 610. On June 20, 2016, Ms. Proto (in  
22 conjunction with Dr. Basinski, who co-signed Ms. Proto's opinion) prepared a Medical Source  
23 Statement of Ability to Do Work-Related Activities (Mental). AR 427-29. She noted the  
24 assessment was for the approximately two-year period commencing on June 3, 2014, through

1 the date of the assessment. AR 427. She assessed marked limitations in plaintiff's ability to  
2 understand, remember, and carry out detailed instructions, and extreme limitations in his  
3 ability to make judgments on simple work-related decisions. AR at 427. She also assessed  
4 marked limitations in his ability to interact appropriately with co-workers and respond  
5 appropriately to work pressures in a usual work setting, and extreme limitations in his ability to  
6 interact appropriately with supervisors and respond appropriately to changes in a routine work  
7 setting. AR at 428.

8 In her handwritten comments, she opined that plaintiff's symptoms of depression,  
9 which included low energy, poor motivation, impaired concentration and at times  
10 disorganization in thought, impacted his ability to remember and follow detailed instructions  
11 and impacted his ability to make appropriate work-related decisions. AR at 427. She further  
12 opined that plaintiff's depression and anxiety interfered with how he related to others, and had  
13 contributed in the past to his inability to sustain full-time employment. AR at 428. She noted  
14 plaintiff had "rigid and obsessive thought processes which impair his ability to adjust to  
15 changes in routine." AR at 428. Finally, she noted that as a result of his home life, he  
16 "developed perfectionist and controlling tendencies which cause vulnerabilities in work  
17 situations and interpersonal relationships, and "particularly [plaintiff] has struggled with  
18 supervisors and authority figures which has resulted in multiple job losses and inability to  
19 respond appropriately to workplace stressors." AR at 428.

20 Ms. Proto, as a mental health counselor, is a lay witness. In order to determine whether a  
21 claimant is disabled, an ALJ may consider lay-witness sources, such as testimony by nurse  
22 practitioners, physicians' assistants, and counselors, as well as "non-medical" sources, such as  
23 spouses, parents, siblings, and friends. *See* 20 C.F.R. § 404.1527(f). Such testimony regarding a  
24 claimant's symptoms or how an impairment affects his/her ability to work is competent



1 evidence, and cannot be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 918-19  
2 (9th Cir. 1993). This is particularly true for such non-acceptable medical sources as nurses and  
3 medical assistants. *See* Social Security Ruling (“SSR”) 06-03p (noting that because such persons  
4 “have increasingly assumed a greater percentage of the treatment and evaluation functions  
5 previously handled primarily by physicians and psychologists,” their opinions “should be  
6 evaluated on key issues such as impairment severity and functional effects, along with the other  
7 relevant evidence in the file.”). If an ALJ chooses to discount testimony of a lay witness, he  
8 must provide “reasons that are germane to each witness,” and may not simply categorically  
9 discredit the testimony. *Dodrill*, 12 F.3d at 919.

10 Here, the ALJ summarized Ms. Proto’s opinion, but found that “although Ms. Proto  
11 appears to see the claimant on a frequent basis, little weight is accorded to the indications  
12 described above given that she is referred to in the record as the claimant’s case manager . . . and  
13 is thus an advocate for the claimant’s disability claim.” AR at 28. The ALJ continued, “[a]long  
14 these lines, the significant limitations that she indicated do not appear to be based entirely on  
15 objective findings.” AR at 28. The ALJ then noted that plaintiff “regularly described the  
16 claimant as cooperative and presenting with normal rate and volume of speech, logical and linear  
17 thought form, appropriate thought content,” among other normal findings, and “such  
18 observations are generally inconsistent with the degree of limitations that she indicated and thus  
19 mitigate the overall persuasiveness of her medical source statement.” AR at 28.

20 The Court finds that the ALJ’s rejection of Ms. Proto’s opinion regarding plaintiff’s  
21 limitations, based upon the fact that her treatment notes included some other normal findings,  
22 is not valid, as the “normal” findings at issue do not contradict her opinion. The ALJ did not  
23 actually provide a reason for rejecting plaintiff’s opinion, for example, that plaintiff has  
24 struggled with supervisors and authority figures, resulting in multiple job losses and inability to


1 respond appropriately to workplace stressors. Moreover, the fact that a therapist is a claimant's  
2 assigned "case manager" does not indicate bias, or provide a germane reason to reject their  
3 opinion. The ALJ erred in rejecting Ms. Proto's opinion without valid reasons.

4 Accordingly, on remand, the ALJ shall reevaluate all the medical opinion evidence of  
5 record in light of the direction provide by this Order. In addition, because this case is being  
6 remanded for reconsideration of the medical evidence, and the ALJ's assessment of plaintiff's  
7 testimony was inescapably linked to his conclusions regarding the medical evidence, the ALJ's  
8 assessment of plaintiff's testimony is also reversed and the issue remanded. After re-  
9 evaluating the medical evidence, including the January 4, 2017 opinion of Dr. Basinski and  
10 Ms. Proto that was submitted to the Appeals Council following the ALJ's decision, the ALJ  
11 should reassess plaintiff's testimony, and provide clear and convincing reasons for rejecting it  
12 should such a conclusion be warranted.

#### 13 VIII. CONCLUSION

14 For the foregoing reasons, the Court ORDERS that this case be REVERSED and  
15 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's  
16 instructions.

17 DATED this 20th day of November, 2018.

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20 JAMES P. DONOHUE  
21 United States Magistrate Judge  
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